NO. 14-462

In the Supreme Court of the United States

DIRECTV, INC.,
Petitioner,
–v–
AMY IMBURGIA, ET AL.,
Respondents.

On Writ of Certiorari to the Court of Appeal of California, Second Appellate District

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae are law professors whose teaching and scholarship involve the fields of constitutional law, contracts, administrative law, civil procedure, federalism, and dispute resolution/arbitration. *Amici* believe that this case presents this Court with an opportunity to affirm principles of federalism and to acknowledge that the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, is an example of a law in which Congress intended to respect federalism and to retain the power of the States with respect to privately negotiated agreements to arbitrate.

SUMMARY OF ARGUMENT

A core principle of federalism is well established: "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., Amdt. 10. "[T]he historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe*

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for amici state that no counsel for a party authored this brief in whole or in part and no person other than amici or their counsel have made a monetary contribution to the preparation or submission of this brief.

Further, the institutional affiliations of *amici* are included for identification purposes only, and are not meant to imply that the positions set forth herein are taken on behalf of the institution.

Elevator Corp., 331 U.S. 218, 230 (1947) (internal citations omitted). This presumption is a "cornerstone" of this Court's pre-emption jurisprudence. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

The present matter concerns the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.* (hereinafter "FAA"). The FAA "does [not] reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 477 (1989). Rather, the FAA provides that an arbitration provision "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Indeed, this Court has recognized that Congress did not preempt the field of arbitration in enacting the FAA. *Volt*, 589 U.S. at 478. It is thus clear that Congress intended the FAA to respect federalism and maintain the power of the States with respect to privately negotiated agreements to arbitrate.

This Court has repeatedly confirmed that "[a]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit." *Hawsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (citations and internal quotations omitted). When parties voluntarily enter into a contract whereby they agree to follow state law, the state law is not preempted. *See, Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 229 (1995). "[S]uch an agreement of parties [should not] be frustrated by judicial 'interpretation' of contracts." *United States v. Moorman*, 338 U.S. 457, 462 (1950). "If parties competent to decide for themselves are to be deprived

of the privilege of making such anticipatory provisions for settlement of disputes, this deprivation should come from the legislative branch of government." *Id.*

In this case, the Parties' contract specifies that State law shall be applied to determine whether a contract was formed, and provides that State law governs the enforceability of the class action waiver and anti-severability clause in the provision regarding arbitration. This Court should respect the core principle of federalism and the specific intent of the Parties in this matter to leave to the State of California the power to decide and resolve matters relating to the enforceability of the arbitration agreement they made pursuant to that State's laws. As such, it is the position of *Amicus Curiae*, that this Court should hold that reference to State law in the arbitration agreement at issue permits the State Court to review that agreement in accordance with the referenced State law.

ARGUMENT

I. Federalism Is A Well-established Principle That Leaves Substantial Powers To The States Unless Congress Provides A Clear And Manifest Purpose To The Contrary.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., Amdt. 10. "The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" *Atascadero State Hospital v. Scanlon*, 473 U.S. 234,

242 (1985), *quoting Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting). "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. 137 (1803). This Court has recognized "the practical importance of preserving local independence, at retail, i.e., by applying pre-emption analysis with care, statute by statute, line by line, in order to determine how best to reconcile a federal statute's language and purpose with federalism's need to preserve state autonomy." *Egelhoff v. Egelhoff*, 532 US 141, 160 (2001) (Breyer, J. dissenting).

"State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *New York v. United States*, 505 U.S. 144, 181 (1992) (internal quotation marks omitted). As James Madison stated:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

Gregory v. Ashcroft, 501 U.S. 452, 458 (1991), citing *The Federalist No. 45*, pp. 292-293 (C. Rossiter ed.

1961). Indeed, this Court has acknowledged "the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.*, 501 U.S. at 424.

"National action has thus always been regarded as exceptional in our polity, an intrusion to be justified by some necessity, as the special rather than the ordinary case." Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 544 (1954). "[T]he historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230 (internal citations omitted). The analysis "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.*

This presumption is a "cornerstone" of this Court's pre-emption jurisprudence. *Wyeth v. Levine*, 555 US 555 at 565. Thus, "[i]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Gregory*, 501 U.S. at 424, citing *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (internal citations omitted); Rotunda & Nowak, *Treatise on Constitutional Law: Substances & Procedure*, 2 Treatise on Const. L. § 12.4(c)(iv)(1) (5th ed., 2013) ("The Supreme Court presumes that Congress does not intend to preempt state legislation unless there is a clear indication from the language or purposes of the federal action or regulation."). As one

scholar articulated, "[b]y requiring Congress to speak clearly in order to preempt state law, *Rice* ensures notice to legislative advocates of state interest that preemption is contemplated in proposed legislation, and it imposes an additional procedural hurdle to legislation that undermines state prerogatives." Earnest Young, *The Ordinary Diet of the Law: The Presumption Against Preemption in the Roberts Court*, 2011 Sup. Ct. Rev. 253, 265.

Finally, "[t]he case for federal preemption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest and has nonetheless decided to 'stand by both concepts and to tolerate whatever tension there [is] between them.'" *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 167 (1989), *quoting Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984). Far from creating a federal rule that might conflict with State law in this case, the FAA entrusts States with determining the law in this area, as discussed below.

II. The Federal Arbitration Act Is A Law In Which Congress Intended To Respect State Law And The Principles Of Federalism.

The matter before this Court concerns the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.* (hereinafter "FAA"). This Court has recognized the purpose of the FAA is "ensur[ing] judicial enforcement" of arbitration agreements. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219 (1985). As is relevant here, the FAA provides that an arbitration provision "shall be valid, irrevocable, and enforceable,

save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This language evidences Congress' clear intent to retain the States' power under the FAA:

> [b]y using the words "save upon such grounds as exist at law or in equity for the revocation of any contract," Congress retained for the States an important role incident to agreements to arbitrate. 9 U.S.C. § 2. Through those words Congress reiterated a basic federal idea that has long informed the nature of this Nation's laws. We have often expressed this idea in opinions that set forth presumptions. *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) ("[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action").

AT&T Mobility v. Concepcion, 131 S. Ct. 1740, 1762 (2011) (Breyer, J., dissenting), *id.* at 1753 (Thomas, J., concurring) ("the FAA requires that an agreement to arbitrate be enforced unless a party successfully challenges the formation of the arbitration agreement, such as by proving fraud or duress").[2]

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[2] Justice Thomas has stated repeatedly his belief the FAA "does not apply to proceedings in state courts" at all. *See, Preston v. Ferrer*, 552 U.S. 346, 363 (2008) (Thomas, J., dissenting); *Allied–Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 285–297 (1995) (same); *Buckeye Check Cashing, Inc. v.*

Importantly, the FAA "does [not] reflect a congressional intent to occupy the entire field of arbitration." *Volt*, 489 U.S. at 477, citing *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956) (upholding application of state arbitration law to arbitration provision in contract not covered by the FAA). Indeed, this Court has recognized that Congress has not preempted the field of arbitration in enacting the FAA:

> While Congress was no doubt aware that the [Federal Arbitration] Act would encourage the expeditious resolution of disputes, its passage "was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered." *Byrd*, 470 U.S., at 220. Accordingly, we have recognized that the FAA does not require parties to arbitrate when they have not agreed to do so, *see id.*, at 219 (the Act "does not mandate the arbitration of all claims"), nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement, *see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S., at 628 (*citing Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967)). It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in

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Cardegna, 546 U.S. 440, 449 (2006) (same); *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 460 (2003) (same); *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 689 (1996) (same). *But see, Southland Corp. v. Keating*, 465 U.S. 1, 10-11 (1984).

> accordance with their terms. *See Prima Paint, supra*, at 404, n. 12 (the Act was designed "to make arbitration agreements as enforceable as other contracts, but not more so").

Volt, 489 U.S. at 478. Thus, arbitration under the FAA "is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, *see Mitsubishi, supra*, at 628, so too may they specify by contract the rules under which that arbitration will be conducted." *Volt*, 489 U.S. at 479 ("Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward.").

Congress' manifest intent is further demonstrated by the fact that, while the FAA creates federal substantive law requiring the parties to honor arbitration agreements, it does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 or otherwise. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U. S. 1, 25, n. 32 (1983). These statements of Congressional intent to retain the power of the States taken with the absence of any manifest statements of intent to obviate such power, make clear that Congress intended the FAA to respect state law and the principles of federalism. As such, this Court should not substitute its judgment for that of Congress.

III. In The Interests Of Federalism, And To Honor Congress' Intent, This Court Should Respect The Parties' Rights To Contract, Including Their Agreement That State Law Governs Their Disputes.

This Court repeatedly has stressed that arbitration clauses are governed by state, not federal, contract law except in those instances where state law targets arbitration clauses for treatment that is inferior to other types of contracts. *E.g., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) (in cases involving the FAA, courts "should apply ordinary state-law principles that govern the formation of contracts"); *Volt*, 489 U.S. at 474 ("the interpretation of private contracts is ordinarily a question of state law"). In addition, this Court has held that principles of state contract law provide the primary source of protection for consumers against corporate over-reaching in cases governed by the FAA. *See, e.g., Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995) ("In any event, § 2 gives States a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision. States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.' "); *see also, Green Tree*, 539 U.S. at 447 (2003) (the question of contract interpretation is "a matter of state law. .").

This Court has repeatedly confirmed that "[a]rbitration is a matter of contract and a party cannot be required to submit to arbitration any

dispute which he has not agreed to so submit." *Hawsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S. Ct. 588 (2002) (citations and internal quotations omitted). When parties voluntarily enter into a contract whereby they agree to follow state law, the state law is not preempted. *See, Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 229 (1995). The parties may contract that otherwise-preempted state law will govern a dispute over an arbitration clause, and a court must analyze the dispute under that state law. *Id.*, 513 U.S. at 228. Hostility to negotiated arbitration provisions cannot justify blindness to a plain intent of parties to adopt arbitration for settlement of their disputes. "Nor should such an agreement of parties be frustrated by judicial 'interpretation' of contracts." *United States v. Moorman*, 338 U.S. 457, 462, 70 S. Ct. 288, 291(1950). "If parties competent to decide for themselves are to be deprived of the privilege of making such anticipatory provisions for settlement of disputes, this deprivation should come from the legislative branch of government." *Id.* As such, this Court should respect the Parties' rights to contract, including to agree to how to resolve their disputes and that State law will govern the analysis.[3]

CONCLUSION

This Court should respect the manifest intent of Congress and the specific intent of the Parties to leave to the State of California the power to decide and

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[3] As the signatories to this brief have been advised that other *amici curiae* will be writing to this Court regarding contract interpretation relating to the Parties' arbitration agreement, those issues are not addressed herein.

resolve matters relating to the enforceability of arbitration agreements made pursuant to that State's laws. Failure to do so will not only violate the intent of Congress in enacting the FAA, but will also violate the well-established principles of federalism ensured by the Constitution. Therefore, this Court should hold that reference to State law in the arbitration provision in the contract at issue permits the State Court to examine the agreement in accordance with that State law.

Respectfully submitted this 24th day of July, 2015,

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